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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DIANA BOGDEN, Plaintiff and Appellant, v. CITIGROUP, INC., et al., Defendants and Respondents.	B278352 (Los Angeles County Super. Ct. No. BC526888)

APPEAL from a judgment of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Reversed.

Diana Bogden, in pro. per., for Plaintiff and Appellant.

Bryan Cave Leighton Paisner and Alfred Shaumyan for Defendants and Respondents.

Plaintiff and appellant Diana Bogden appeals from the trial court's denial of her motion to vacate, for attorney fault, a dismissal entered against her. Bogden argues that her attorney's declaration was sufficient under Code of Civil Procedure section 473, subdivision (b) to justify mandatory relief from the dismissal of her action against defendants and respondents Citigroup, Inc., Citibank, N.A., Citi Residential Lending, Inc., CitiMortgage Inc., Associates First Capital Corp. and CR Title Services (collectively, Citibank). We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

To call this case a procedural quagmire is something of an understatement. Bogden was one of many plaintiffs in a mass-joinder litigation brought by an attorney who abandoned his clients shortly after filing suit, and was suspended from the practice of law while the action was pending. Although the court and opposing counsel were aware of the attorney's apparent abandonment, if not his actual suspension, they nonetheless allowed the action to proceed to dismissal against Bogden and her co-plaintiffs when they were virtually unrepresented. An associate who joined the suspended attorney's firm filed a motion to vacate the dismissal, supported by a declaration of fault by the suspended attorney. Just before the hearing on the motion to vacate, a receiver took over the troubled firm and the parties stipulated to a continuance of the motion to vacate. The court denied the continuance, proceeded to a hearing where neither party appeared, and denied the motion to vacate.

As we shall explain, the road to this miscarriage of justice also contained a notice of ruling which did not match the court's order, a dismissal order which did not match the court's intended

order, and a number of attorneys not officially substituting out of a representation when they should have done so.

Our recitation of the complete history of the case begins not with plaintiff Bogden, but with her attorney, Vito Torchia, Jr. and his law firm, Brookstone Law, PC.

1. *Attorney Torchia and Brookstone Law*

Attorney Torchia opened Brookstone in 2009. Some time after, he "expanded the scope of Brookstone's practice to include mass-joinder litigation and related legal services necessary to postpone foreclosure sales on real property (e.g., bankruptcy). Mass-joinder litigation refers to lawsuits in which numerous (e.g., hundreds of) property/homeowners sue their common mortgage lender or servicer for alleged false, fraudulent, and deceptive lending and foreclosure practices."

While it is unknown how Bogden came to be a client of Brookstone, Brookstone obtained some of its clients by means of "mass mailing advertising" to property owners.

2. *The Mass-Joinder Complaint in This Action*

On November 5, 2013, Attorney Torchia filed the complaint against Citibank in this action.[1] The plaintiffs were 68 individuals, Bogden among them, who together alleged 24 causes of action arising from: (1) the intentional placement of borrowers into dangerous loans they could not afford by use of deceptive tactics; (2) individual appraisal inflation; (3) market-fixing; (4) deception in loan modifications; and (5) (with respect to some plaintiffs other than Bogden) unauthorized foreclosures.

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[1] There were other defendants named in the action. In her brief on appeal, Bogden concedes that she is only pursuing Citibank.

The complaint consisted of approximately 100 pages of allegations on behalf of all of the plaintiffs together, followed by an appendix setting forth the facts pertaining to each individual plaintiff. The appendix indicates that Bogden's complaint arises from a mortgage refinance. She alleged that: (1) she had been steered into an adjustable rate mortgage, but did not know the interest rate was, in fact, adjustable, nor did she know her payments for the first five years were interest-only; (2) Citibank had altered her loan application without her knowledge, to indicate that she had a greater income, so that she would be approved for a loan she could not, in reality, afford; (3) defendants fraudulently inflated the appraisal on her property to justify an increased loan amount; (4) Citibank represented that she would be able to refinance the loan later, but she could not do so, because her actual income was too low and she had insufficient equity in her home; and (5) had she known the truth, she never would have accepted the loan.

3. *The Case is Removed to Federal Court*

On January 6, 2014, Citibank removed the case to federal court, due to the presence of a single federal law cause of action. The case would ultimately be remanded, but the proceedings in federal court are notable because it was during these proceedings that Attorney Torchia first disappeared.

4. *Attorney Torchia Stops Participating*

After the case was removed to federal court, plaintiffs conceded that their federal cause of action was not properly pleaded and should be dismissed, which would defeat federal question jurisdiction. On April 22, 2014, the district court concluded that the matter should be remanded back to state court, but indicated that its remand order would not be effective

until plaintiffs filed a request for dismissal of their federal cause of action.

Attorney Torchia did not file a request for dismissal. Nor did he respond to a series of orders to show cause why he should not be sanctioned for failing to do so and failing to appear. Eventually, the district court dismissed the federal cause of action itself, imposed sanctions, remanded the matter to state court, and required Attorney Torchia to pay Citibank over $16,000 in attorney fees. The court's order explained that Attorney Torchia could not "proceed with inappropriate litigation tactics, fail to comply with court orders, and cause the opposing parties to incur unnecessary costs, without consequences." Attorney Torchia did not pay, and a bench warrant would ultimately be issued in February 2015.

5. *The Case Returns to State Court*

The case was remanded in August 2014. By order of August 21, 2014, the trial court set the case for a case management conference for September 29, 2014.

6. *Citibank Demurs and Attorney Torchia Does Not Oppose*

On September 10, 2014, Citibank demurred to the complaint, arguing, among other things, that the plaintiffs were misjoined. Attorney Torchia filed no opposition to the demurrer. Nor did he file an opposition to Citibank's motion to strike, or the other defendants' motions challenging the complaint. Attorney Torchia simply did not participate in the case, just as in federal court.

7. *Attorney Torchia Briefly Surfaces in Connection with the Case Management Conference*

After the case had been remanded to state court, Attorney Torchia filed only two documents on behalf of plaintiffs. The first

was a September 26, 2014 case management statement for plaintiffs. Attorney Torchia also attended, by telephone, the September 29, 2014 case management conference. At the conference, the court ordered Attorney Torchia to file "a detailed declaration with information of all parties, including which parties have been served and what remains in this case" by October 17, 2014. The case management conference was continued to May 12, 2015, to be heard with the then-pending demurrers.

Attorney Torchia did not file the required declaration. In fact, he would go on to file only one more document on behalf of plaintiffs, an association of counsel.

8. *Brookstone Has a Win in the Petersen Litigation*

Before we discuss the association of counsel, we pause to recognize that, while Brookstone's mass-joinder action against Citibank was pending in this court, Brookstone had been pursuing other mass-joinder litigations in other courts. Brookstone's action against Countrywide Financial Corporation had been dismissed for misjoinder of plaintiffs. On December 11, 2014, Division Three of the Court of Appeal, Fourth Appellate District reversed, holding, albeit over a dissent, that Brookstone's mass-joinder action was not, in fact, misjoined. (*Petersen v. Bank of America Corp.* (2014) 232 Cal.App.4th 238 (*Petersen*).) The *Petersen* action had been filed by Attorney Torchia on behalf of 965 plaintiffs; and the complaint contained similar allegations to the complaint in this case. (*Id.* at pp. 240-241.) Review was denied in *Petersen* on March 25, 2015.

Because Attorney Torchia did not oppose Citibank's demurrer, he did not bring the *Petersen* opinion to the court's attention in response to Citibank's demurrer for misjoinder. By

the time the demurrer was heard, May 12, 2015, the *Petersen* case was final.

9. *Attorney Torchia Associates in Attorney Mortimer*

On March 4, 2015, Attorney Torchia filed, on behalf of plaintiffs, a notice of association of counsel, associating in as co-counsel Attorney John E. Mortimer, a non-Brookstone attorney. Both attorneys signed this association. Attorney Mortimer would ultimately submit a declaration explaining that he "agreed to assist as requested, and as mutually agreed upon, but never independently." He was never asked to do anything by Attorney Torchia, and therefore, did nothing in the case.

After filing the association of Attorney Mortimer, Attorney Torchia filed nothing else in this case, until he was called upon to file a declaration of attorney fault.

10. *The May 12, 2015 Demurrer Hearing Proceeds Without Attorney Torchia*

Prior to the May 12, 2015 hearing, Citibank filed a notice of non-opposition to its demurrer.

Neither Attorney Torchia nor Attorney Mortimer attended the May 12, 2015 hearing.

Two things occurred at the demurrer hearing, somewhat simultaneously. First, one of the plaintiffs, Earl Luevano, had sought permission to substitute in for Attorney Torchia as a self-represented litigant, but had not been able to obtain Attorney Torchia's signature on the substitution. The court issued an order allowing Luevano to substitute in without Attorney Torchia's signature. The court stated, "The court bases this order on the court's judicial notice of the proceedings in Federal District Court . . . , wherein attorney Torchia has failed to appear multiple times for hearings, and failed to follow court orders, and

had to be ordered to appear via a bench warrant. Similarly, attorney Torchia failed to appear . . . today for a hearing on two demurrers, and failed to file any opposition. Therefore, the court rules plaintiff Luevano may terminate present counsel and file a Notice of Substitution without counsel's signature, based on the court's determination that plaintiff Earl Luevano's attempts to find his counsel and obtain a signature would be futile."

At the same time, the court sustained the demurrers for misjoinder of plaintiffs.[2] Other than plaintiff Luevano, who had sought permission to appear for himself, no one appeared for any of the plaintiffs. There is no indication that anyone present at the hearing questioned whether it was appropriate to proceed, given Attorney Torchia's apparent abandonment of his clients.

The court concluded that the plaintiffs were improperly joined, in that they each relied on different transactions and alleged different misrepresentations based on different evidence. The court's minute order states, "one of the plaintiff's [*sic*] may amend to continue this lawsuit against the defendant or defendants of their choosing, within 10 days, . . . "[3] The court's minute order did not explicitly address the disposition of the complaint as it pertained to all of the other plaintiffs.

Citibank was to give notice of ruling.

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[2] The non-Citibank defendants also successfully demurred on the merits. Again, these defendants are not parties to this appeal.

[3] The remainder of the quote referred to plaintiff Luevano, whose different treatment is of no further relevance to this appeal.

11. *Citibank Serves an Erroneous Notice of Ruling*

On May 13, 2015, Citibank served notice of ruling, which states that its demurrer "was SUSTAINED on the grounds of misjoinder with 10 days leave to amend as to all Plaintiffs, . . ." This is incorrect; the court's minute order states that only one plaintiff may amend, while Citibank's notice of ruling provided that "all Plaintiffs" had 10 days leave to amend. On appeal, Citibank represents that the trial court did, in fact, grant leave "so that a single plaintiff could file an amended complaint," which is not what it stated in its notice of ruling. In reply, Bogden takes the position that the court had granted all plaintiffs leave to amend, as set forth in Citibank's notice of ruling, and suggests that it was the court's minute order which was wrong. We conclude the court's minute order, and not Citibank's notice of ruling, properly expresses the court's ruling: the court sustained the demurrer on the ground of misjoinder, and permitted only a single plaintiff to amend.

However, Citibank's mistaken notice of ruling would be the cause of confusion by the time of the motion to vacate. As we have noted, no counsel for plaintiffs attended the hearing, and the notice of ruling from Citibank indicated that, at this stage in the proceedings, all plaintiffs were permitted to file an amended pleading. In other words, Citibank's notice of ruling gave the impression that plaintiffs were given a second bite at the misjoinder apple, even though this did not appear to have been the court's ruling.

12. *Attorney Torchia Is Suspended; Does Not Act*

Unbeknownst to the parties, on May 14, 2015, two days after the trial court sustained Citibank's demurrer, the State Bar Court entered Attorney Torchia's default in disciplinary

proceedings pending against him. As a result of his default, Attorney Torchia was enrolled as inactive as of May 17, 2015. Thus, during the 10-day period in which a single plaintiff had leave to file an amended complaint, Attorney Torchia was suspended from practice. No amended complaint was filed.

13. *The Action is Dismissed With Prejudice*

Given that the 10 days passed with no amended complaint, Citibank drafted and served a proposed order dismissing the claims of all plaintiffs. The proposed order indicated that the complaint was dismissed with prejudice. On June 12, 2015, the court signed the order.

On July 6, 2015, Citibank served notice of entry of that order on Attorneys Torchia and Mortimer.

14. *Bogden Attempts to Take Action*

According to Bogden, Citibank telephoned her on July 17, 2015, telling her that the case had been dismissed, so it was commencing foreclosure proceedings. At this point, she attempted to reach Attorney Torchia, but could not get a response from anyone at Brookstone. She ultimately came to understand that counsel had stopped working on the case sometime in 2014, but had not told his clients.

On July 21, 2015, Bogden, acting in pro. per., but without having formally substituted in, filed a motion requesting compliance with Code of Civil Procedure section 286 and for reconsideration of the order of dismissal.[4]

Section 286 provides, "When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action, for whom he was acting as attorney, must, before any

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[4] All future undesignated statutory references are to the Code of Civil Procedure.

further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney, or to appear in person." Case authority provides that when notice is required under section 286 but not given, the court is "deprived of jurisdiction." (*California Water Service Co. v. Edward Sidebotham & Son, Inc.* (1964) 224 Cal.App.2d 715, 734.) Proceedings occurring in violation of this section are void, and may be set aside as such on noticed motion. (*Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 743.)

Bogden's motion did not specifically seek to vacate the court's orders. Instead, Bogden sought reconsideration of the dismissal, and retroactive notice under section 286. This motion, which we refer to as "Bogden's section 286 motion," was set for hearing on March 4, 2016, was continued once by stipulation, and would never actually be heard.

15. *The July 30, 2015 Status Conference*

A status conference was held on July 30, 2015. Bogden was represented by counsel at the hearing. Attorney David Azar filed a notice of limited scope representation for Bogden, stating he was representing her only at the status conference.[5] At the

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[5] There are specific rules governing a limited scope representation. California Rules of Court, rule 3.36(b) provides that once a party and attorney provide notice of limited scope representation, all papers must be served on both the attorney providing the limited scope representation and the client. A limited scope representation is not self-terminating; instead, if the client does not sign a substitution when the limited scope tasks are completed, rule 3.36 provides a means by which the limited scope attorney can be relieved by the court. No substitution out was ever filed, nor did Attorney Azar follow the rule 3.36 procedure to be relieved. For this reason, Citibank

status conference, Attorney Azar informed the court that the order of dismissal had been with prejudice. The court explained that it had not intended to dismiss the plaintiffs with prejudice, and would consider an amended order. A status conference regarding submission of an amended order of dismissal was set for September 8, 2015. Attorney Azar filed a second notice of limited scope representation, in order to continue representing Bogden to negotiate the amended order.

16. *Attorney Jonathan Tarkowski of Brookstone Becomes Involved*

At this point, Attorney Jonathan Tarkowski represented himself to be a new attorney with Brookstone and "counsel for all Plaintiffs." He filed a motion for an amended order dismissing the plaintiffs' claims without prejudice. Thereafter, negotiations took place among Attorney Azar (representing Bogden), Attorney Tarkowski (possibly representing all plaintiffs) and counsel for Citibank, attempting to reach agreement on a joint proposed order.[6] They could not do so.

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takes the position that Attorney Azar remained Bogden's counsel of record long after his limited scope representation was completed, even though neither he nor Bogden believed he was still representing her.

[6] Whether Attorney Tarkowski believed himself to be representing all of the plaintiffs at this point, and whether he actually was, is somewhat unclear. He submitted a proposed order which included his representation that he "now plans to file an amended complaint on behalf of any Plaintiffs who would like a Brookstone attorney to continue to represent them, but given the recent history in this matter, and the fact that he is [a] new employee at Brookstone, has practiced for only one year and has limited experience in this area, ***he wants to provide full***

17. *The Dismissal is Amended to "Without Prejudice"*

At the hearing on September 8, 2015, the court ordered its prior order of dismissal with prejudice amended nunc pro tunc to a dismissal without prejudice. The court expressed frustration with Citibank's counsel for having drafted the order as a dismissal with prejudice when the court had never intended that. At this hearing, the court also questioned why Attorney Azar had not contacted Attorney Mortimer, who was still counsel of record for plaintiffs.

18. *Attorney Mortimer Withdraws*

The court's comments regarding Attorney Mortimer brought results. On October 1, 2015, Attorney Mortimer, who had done nothing in the case since he had been associated in, withdrew his association as co-counsel for plaintiffs.

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disclosure to the Court and the individual plaintiffs, and ***permit the individual plaintiffs sufficient time after that disclosure (sixty days) to either find alternative counsel, represent themselves, or consciously choose to have him represent them.***" (Emphasis original.) At the next hearing, Attorney Tarkowski entered his appearance for all plaintiffs except Bogden, while Attorney Azar said that he believed Brookstone (and therefore, Attorney Tarkowski) also represented Bogden. The court stated that since Attorney Tarkowski had not substituted in, he was "like some sort of a third-party arriver here," who lacked standing to appear in the case. The issue is not directly before us, although we note that the Brookstone firm never actually substituted out. Later, apparently in an effort to satisfy the court's concerns, Attorney Tarkowski (on behalf of Brookstone) associated himself (again, on behalf of Brookstone) into the case.

19. *Attorney Tarkowski Files a Motion to Vacate the Dismissal*

On November 12, 2015, Attorney Tarkowski, purporting to act for all plaintiffs, filed a motion to vacate the dismissal under section 473. The motion was set for hearing on August 10, 2016.

Attorney Tarkowski sought to vacate both the dismissal and the order sustaining the demurrer which led to the dismissal. He sought relief under both branches of section 473 – discretionary relief and mandatory relief for attorney fault. Additionally, he sought relief under the court's inherent power to provide equitable relief.

As we will resolve the appeal on the issue of mandatory relief due to attorney fault, we limit our discussion of the motion to that basis. Section 473(b)'s mandatory relief provision states in pertinent part: "Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties."

Attorney Tarkowski argued that the adverse demurrer ruling and dismissal arose because of Attorney Torchia's failure to oppose the demurrer. He specifically argued that if Attorney

Torchia had bothered to oppose the demurrer, he could could have successfully defeated the misjoinder argument by relying on the recent *Petersen* case.

The motion was supported by a declaration of Attorney Torchia accepting responsibility for the dismissal of the action. First, he admitted fault for failing to oppose the demurrer. He explained that, during this time, he fell into a depression and "started drinking at an alarming rate." He explained, "As a result of my deep depression and heavy drinking, I failed to properly represent the clients myself, or provide for their representation by proving adequate support and assistance through other attorneys." He stated, "Due to my condition I failed to draft and file oppositions to any and all Defendants' demurrers." He also admitted failing to attend the hearing. He stated, "I do believe that if I was not in deep depression, heavily drinking, and isolated that I would have opposed the demurrers filed by Defendants and attended the May 12, 2015 [hearing]."

Second, he admitted fault for not responding when granted 10 days leave to amend. He admitted that he was suspended effective May 17, 2015 (five days after the hearing on the demurrer). He stated that he does not recall "when or if" he was served with Citibank's notice of ruling from the demurrer hearing. Nonetheless, he explained that if he was served with the notice of ruling (or the orders), he was not licensed to practice law at that time. If he had been able to practice law and was not depressed or under the influence of alcohol, he "would have filed an amended complaint to properly address the joinder issue on which Citi Defendants' demurrer was granted," by relying on *Petersen*. More than that, Attorney Torchia admitted, "I failed to

adequately notify Plaintiffs in this matter of my suspension from practicing law and their rights as a result of my suspension."

Finally, Attorney Torchia admitted that all fault was his and not Attorney Mortimer's. He explained that, although he had associated in Attorney Mortimer, he "failed to provide any instructions to Mr. Mortimer as to proceed with prosecuting the case. I failed to notify Mr. Mortimer of hearings, filings, deadlines, and/or tasks that needed to be completed to prosecute this action." Attorney Mortimer filed a declaration confirming that he had associated in to assist "as requested" by Brookstone, but that he had never been requested to provide any legal services in the case.

20. *Attorney Tarkowski Seeks Leave to File an Amended Complaint*

When a motion to vacate seeks discretionary relief under section 473, as Attorney Tarkowski's motion did, the motion must be accompanied by a copy of the pleading proposed to be filed. Instead of attaching a proposed amended complaint to the motion for relief from default, Attorney Tarkowski filed a simultaneous motion for leave to file a first amended complaint. The proposed amended complaint was again, a mass-joinder complaint, filed on behalf of many plaintiffs, including Bogden.

21. *A Receiver Takes Over Brookstone*

While the parties were awaiting the August 2016 hearing on the motion to vacate, they were blissfully unaware that the Federal Trade Commission (FTC) was preparing a complaint against Brookstone and related individuals and entities, including Attorneys Torchia and Tarkowski. While the actual allegations of the FTC are not before us, it appears that the FTC believed Brookstone ran afoul of the federal Mortgage Assistance

Relief Services Rule, possibly in connection with the advertising of its services to consumers.

The FTC obtained the appointment of a temporary receiver over Brookstone by means of a temporary restraining order dated June 1, 2016. The receivership was to last until to July 1, 2016, so that the matter could be heard on the FTC's application for a preliminary injunction.

22. *The Receiver Requests a Stay; The Parties Stipulate to It*

On June 17, 2016, the receiver filed a notice, in this action, that Brookstone had been placed in receivership, and requested a 90-day stay of proceedings. The receiver stated that it had taken control of Brookstone "and suspended operations." It represented that Brookstone would remain closed until the hearing on the preliminary injunction and, if such an injunction issued, Brookstone "will remain closed indefinitely afterwards . . . ." The receiver requested a 90-day stay so that Brookstone's clients could be notified and given an opportunity to obtain new counsel.

At the end of June 2016, the temporary restraining order, including the appointment of a receiver, was transformed into a preliminary injunction.

On July 22, 2016, the receiver, Citibank, and Bogden (representing herself) stipulated to stay the proceedings and continue the scheduled hearing on the motion to vacate, then currently set for August 10, 2016. They stipulated to stay the case for 90 days and continue the hearing for at least 180 days.

The parties assumed the stipulation would be approved. Indeed, on appeal, Citibank concedes that it "did not file an opposition [to the pending motion to vacate] because of the parties' stipulation attempting to continue the hearing."

23. *The Court Denies the Stipulation and the Motion to Vacate*

The court denied approval of the stipulation. It proceeded with the scheduled hearing on the motion to vacate and motion for leave to file an amended complaint on August 10, 2016. The only appearances were one plaintiff (not Bogden) in pro. per., and counsel for a non-Citibank defendant. There was no court reporter.

The minute order reads as follows: "Matter is called for hearing. [¶] Plaintiffs' motion to vacate orders of dismissal is DENIED. Given that the first motion is denied, this case remains dismissed without prejudice and the accompanying motion to file a FAC is also DENIED. There is no basis for the court to stay this case as it was already dismissed in May 2015. The Stipulation for Stay of Proceedings submitted by the court appointed receiver is not signed."

24. *Bogden Appeals*

Bogden filed timely a notice of appeal from the August 10, 2016 order, stating that she was appealing "from the final judgment and all orders that are separately appealable."

DISCUSSION

On appeal, Bogden represents that she is appealing from: (1) the denial of the motion to vacate; (2) the denial of the motion for leave to file the first amended complaint; and (3) the failure of the court to hear and rule on Bogden's section 286 motion. We need address only the first of these. We conclude that the motion to vacate was properly supported by Attorney Torchia's declaration of fault and should have been granted.

Although Citibank disagrees substantively, it also raises multiple procedural challenges to this court even reaching the merits of the appeal. It argues: (1) the order denying the motion

to vacate is not an appealable order; (2) the record is inadequate to enable appellate review because there is no reporter's transcript of the August 10, 2016 hearing; and (3) Bogden forfeited the right to appeal by not attending the hearing on her motion to vacate. We will first consider, and reject, Citibank's procedural challenges. We will then discuss the merits of the motion to vacate and conclude Attorney Torchia's declaration was sufficient to mandate relief.

1. *The Order Denying the Motion to Vacate is Appealable*

Citibank's first argument is that the court's order denying the motion to vacate is not an appealable order.

"An order denying a motion to vacate a judgment or dismissal under section 473 is appealable . . . ." (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 611.) Citibank's argument that Bogden may not appeal the order denying the motion to vacate under section 473 is based on the following rationale: The order denying a motion to vacate is a postjudgment order, which is only appealable if the underlying judgment is. But the underlying judgment in this case was a dismissal without prejudice. Being without prejudice, the dismissal is not a final appealable judgment.

Citibank is twice mistaken. While it is true that the denial of a motion to vacate is appealable as a postjudgment order under section 904.1, subdivision (a)(2), the denial of a statutory motion to vacate under section 473 may be appealable even when the underlying judgment is not. (*Jackson v. Kaiser Foundation Hospitals, Inc.* (2019) 32 Cal.App.5th 166, 169-170.)

As to the dismissal without prejudice in this case, it is, in fact, a final appealable judgment. The confusion appears to have arisen from the line of cases culminating in *Kurwa v. Kislinger*

(2013) 57 Cal.4th 1097, in which the Supreme Court concluded that parties cannot create appealability, when a judgment does not dispose of all causes of action, by voluntarily dismissing the remaining causes of action without prejudice and stipulating to waive operation of the statute of limitations. (*Id.* at p. 1100.) Citibank apparently believes that the factor causing non-appealability in that scenario is that the dismissal is without prejudice. To the contrary, *Kurwa* expressly approved of *Abatti v. Imperial Irrigation Dist.* (2012) 205 Cal.App.4th 650, 655, which held that the determinative factor was not whether the dismissal was without prejudice, but whether the parties waived the statute of limitations.

The *Abatti* court concluded "that claims that are dismissed without prejudice are no less final for purposes of the one final judgment rule than are adjudicated claims, unless . . . there is a stipulation between the parties that facilitates potential future litigation of the dismissed claims." (*Abatti, supra,* 205 Cal.App.4th at p. 655.) "In our view, the theoretical possibility of future litigation of claims that have been dismissed without prejudice and without a stipulation does not render a judgment any less final than does the possibility of litigation of claims that may be asserted in the first instance on remand." (*Id.* at p. 667.) In *Kurwa*, our Supreme Court agreed, observing that a dismissal without prejudice unaccompanied by a stipulation to waive the statute is, in fact, sufficiently final. (*Kurwa, supra,* 57 Cal.4th at pp. 1105-1106.)

In this case, the claims of all plaintiffs were involuntarily dismissed without prejudice. Nothing was preserved to facilitate future litigation. That dismissal is final and appealable,

rendering the denial of the motion to vacate that dismissal an appealable postjudgment order.

2. *The Record on Appeal is Sufficient to Enable Appellate Review*

There was no reporter present at the hearing on the plaintiffs' motion to vacate the dismissal in favor of Citibank. Citibank contends the absence of a reporter's transcript is fatal to Bogden's appeal.

Counsel has a duty to ensure that a court reporter is present at a hearing when counsel has reason to anticipate that what is said at the hearing may be pertinent to a subsequent appeal, and the failure to obtain a reporter can be tantamount to a waiver of the right to appeal. (*In re Christina P.* (1985) 175 Cal.App.3d 115, 129.) The absence of a reporter's transcript is fatal to an appellate challenge to the sufficiency of the evidence; without a transcript, it is presumed that the unreported testimony would demonstrate the absence of error. (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992.) But when our review is de novo, and the record contains the court's written orders and all evidentiary materials germane to the motion, a record of the hearing is not necessary to resolve the appeal. (*Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 933-934.)

Thus, to determine whether the record is adequate in the absence of a reporter's transcript, we must turn to the standard of review of the denial of Bogden's section 473 motion for mandatory relief due to attorney fault. If the prerequisites for relief are met, a trial court is without discretion to deny relief. Our review is de novo, unless the applicability of the provision turns on disputed facts. (*Leader v. Health Industries of America, Inc., supra,* 89 Cal.App.4th at p. 612.) Here, plaintiffs submitted

a declaration of Attorney Torchia attesting to his neglect. Citibank submitted no evidence in opposition to the motion and, in fact, no opposition at all. Neither plaintiffs nor Citibank appeared at the hearing on the motion; thus, no evidence could have been introduced in connection with the motion at the hearing. As such, there are no disputed facts, and our review is de novo.[7] The absence of a reporter's transcript does not prevent our review.

3. *Bogden Did Not Forfeit Her Right to Appeal by Failing to Attend the Hearing*

Relying on *In re Aaron B.* (1996) 46 Cal.App.4th 843, Citibank contends Bogden forfeited her right to appeal by not attending the hearing on the motion to vacate and objecting to the court's ruling denying the motion. *In re Aaron B.* included the following language: "We recently have been deluged with

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[7] To the extent Citibank suggests that *Adoption of Arthur M.* (2007) 149 Cal.App.4th 704, 717 holds that we may use substantial evidence review even on uncontradicted evidence, Citibank's statement of the case's holding is correct, but inapplicable. *Arthur M.* was concerned with whether a baby's father had failed to promptly assume his parental responsibilities. The father testified that he was afraid to come forward because he feared he would be prosecuted for rape. His testimony as to his belief itself was *uncontradicted* – obviously, nobody else could testify as to what he was thinking. But his testimony was not *undisputed* – the mother introduced a great deal of evidence showing by the father's conduct that this was not, in fact, the reason that he failed to assume his obligations toward the child. The Court of Appeal held that the trial court had not been bound by uncontradicted testimony which was, in fact, disputed by other evidence. (*Ibid.*) Here, in contrast, there was no disputed evidence. De novo review applies.

similar cases in which the appellant raises issues on appeal without having appeared or made a record in the trial court. At the risk of sounding like a broken record, we again cite the general rule: '[A] party is precluded from urging on appeal any point not raised in the trial court. [Citation.] Any other rule would " ' "permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not." ' [Citations.]" [Citation.]' [Citation.] Appellant failed to make court appearances below, failed to keep in contact with his attorney, failed to object to the challenged reports below, and failed to provide the trial court with evidence supporting his position. Consequently, he cannot raise the issue on appeal." (*Id.* at p. 846.)

That is not this case. Initially, it was Bogden's attorney who abandoned her; she was one of only a handful of plaintiffs who attempted to become involved and take action when she learned of the abandonment. As to her specific failure to attend the hearing on the motion to vacate, it is apparent that Bogden did not attend because she believed, *as did Citibank*, that the court accepted the parties' stipulation to continue the hearing due to Brookstone's receivership. This was not a party playing fast and loose with the administration of justice by deliberately standing by without objection. Instead, it was a party who chose not to attend a hearing all parties had stipulated to continue because the law firm which had brought the scheduled motion was barred by federal court injunction from pursuing it.

Having rejected Citibank's procedural challenges, we turn to the merits of the appeal – whether the trial court should have granted Bogden's motion to vacate the dismissal on the basis of attorney fault.

4. *The Dismissal was the Proper Subject of a Motion to Vacate for Attorney Fault*

Preliminarily, Citibank argues that mandatory relief under section 473, subdivision (b), should not apply to the type of dismissal entered in this case. In *Leader v. Health Industries of America, Inc., supra,* 89 Cal.App.4th at page 618, the court explained that mandatory relief for attorney fault does not apply to all dismissals. Instead, it is limited to dismissals which are comparable to defaults – those dismissals which occur because an attorney failed to oppose a dismissal motion. Thus, it does not apply to discretionary dismissals based on the failure to file an amended complaint after a demurrer has been sustained with leave to amend where "the dismissal was entered after a hearing on noticed motions that required the court to evaluate the reasons for delay in determining how to exercise its discretion." (*Id.* at p. 621.) Citibank argues that relief should be precluded in this case under an extension of *Leader*.

We need not decide whether every dismissal without prejudice is the equivalent of a default judgment such that the trial court is required to grant relief under section 473, subdivision (b). Here, however, notwithstanding the language of its September 8, 2015 order that the dismissal was without prejudice, on August 10, 2016, the trial court denied the plaintiff's request to file a first amended complaint, and the only possible basis for the denial of that motion was that plaintiff had failed to timely file an amended complaint after failing to oppose

the demurrer. That is precisely the type of dismissal that mandatory relief for attorney default was intended to relieve. This was a dismissal which was the equivalent of a default; counsel did not oppose the dispositive motions. Case authority has established that *Leader* does not foreclose relief when a dismissal is entered for a failure to respond to a demurrer and to timely file an amended complaint. (*Pagnini v. Union Bank, N.A.* (2018) 28 Cal.App.5th 298, 306; *Younessi v. Woolf* (2016) 244 Cal.App.4th 1137, 1148-1149.)

5. *Attorney Torchia's Declaration of Fault was Sufficient*

Reviewing Attorney Torchia's declaration and the undisputed procedural history de novo, it is difficult to conceive of a case more strongly calling out for relief for attorney fault. Citibank's demurrer was sustained on the basis of misjoinder. Attorney Torchia had (with the exception of participation in the case management conference) disappeared from the case for a year, resulting in sanctions and a bench warrant. He had not opposed the demurrer, even though he possessed recent case authority holding that joinder was proper in a nearly identical mass-joinder case he had brought. He declared that his lack of opposition was due to depression and drinking to excess, and accepted full responsibility. As to the dismissal for failing to amend in the time period allotted, Attorney Torchia's declaration was the same, except it added that, during the 10-day period to amend, he had been suspended from the practice of law, and failed to inform his clients of that fact. Perhaps Attorney Torchia did not die on the proverbial sword, but he certainly pointed the weapon in his own direction. In short, the declaration admits mistake and neglect.

The sole issue left for determination is whether "the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (§ 473, subd. (b).) Causation, for the purposes of a motion to vacate for attorney fault, is governed by the same standard of proximate cause as in the context of legal malpractice. (*Milton v. Perceptual Development Corp.* (1997) 53 Cal.App.4th 861, 867.) Thus, the attorney's negligence need not be the only proximate cause, as long as there is causation in fact. (*Ibid.*) Citibank suggests that the attorney must be the sole cause; this is incorrect. There is authority that, to obtain relief, the attorney must be solely responsible, *vis-à-vis the client*, who must be innocent of wrongdoing.[8] (*Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1251-1252.) Citibank cites no authority for the proposition that relief is not available when there may be causes, other than the client, in addition to the attorney's fault. To the contrary, as long as the attorney is a proximate cause of the default or dismissal, relief is mandatory even when the client was simultaneously represented by a second attorney who took no action. (*Milton, supra,* at p. 867 & fn. 5.) Thus, Citibank's argument that Attorney Mortimer's presence in the case defeats causation is unavailing.

We are similarly not persuaded by Citibank's argument that Attorney Torchia did not admit sole fault because he did not specifically admit receiving Citibank's notice of ruling on the

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[8] This is a disputed issue in the law. "[C]ourts are still divided as to whether [relief] is available when the error lies partly at the client's feet and partly at the attorney's [citations]." (*Martin Potts & Associates, Inc. v. Corsair, LLC* (2016) 244 Cal.App.4th 432, 442.)

demurrer, stating instead that he did not recall when or if he received the notice. Even if there had been a problem with service, it would not make Attorney Torchia less culpable; his abandonment remained a proximate cause. In any event, Attorney Torchia's declaration is not reasonably construed as asserting a service error. Instead, Attorney Torchia candidly admitted that he simply has no recollection of receiving the notice of ruling in the midst of his depression and heavy drinking.

Citibank also suggests that Attorney Torchia's declaration is insufficient because Attorney Torchia stated that if he had received the notice of ruling and was not suspended or under the influence, he would have filed an amended complaint to properly address the joinder issue. Citibank argues that this is inadequate because filing an amended complaint to address the joinder issue would have, in fact, violated the trial court's order, as the court granted leave for only one plaintiff to file an amended complaint. But it was Citibank's notice of ruling which misstated that all plaintiffs had been granted leave to amend. If Attorney Torchia was mistaken about the court's ruling in this respect, Citibank cannot be heard to complain about it.

6. *Procedure on Remand*

The trial court erred in denying the motion to vacate the dismissal. We therefore reverse the order and remand with directions that the court vacate the dismissal entered against Bogden and grant her reasonable leave to amend her complaint.

Citibank states that, if we conclude that Bogden is entitled to vacate the dismissal, "Bogden must pay Citi's reasonable compensatory legal fees and costs [under section 473, subdivision (b)]." That section provides, "The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the

attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties." The plain language of the statute provides that the attorney, not the client, be directed to pay compensatory fees and costs. Any requests for fees and costs from Attorney Torchia should be directed, in the first instance, to the trial court.

DISPOSITION

The order denying Bogden's motion to vacate the dismissal is reversed. The trial court shall enter a new and different order granting the motion to vacate the dismissal and allowing Bogden reasonable leave to amend her complaint. Citibank is to pay Bogden's costs on appeal.

RUBIN, P. J.

WE CONCUR:

MOOR, J.

KIM, J.